STATE BOARD OF EQUALIZATION
STAFF LEGISLATIVE BILL ANALYSIS

Date Introduced:	**12/02/02**	Bill No:	SCA 1
Subject:	**Open Meetings and Public Records Act**	Author:	**Burton**
Board Position:		Related Bills:	**SCA 7 (Burton, 2002)**

BILL SUMMARY:

This bill, a constitutional amendment that would require statewide majority voter approval prior to going into effect, would amend Article I, Declaration of Rights, of the California Constitution to provide that public access to government records and official meetings of governmental bodies is a fundamental right of Californians.

This bill would: (1) make it a constitutional right to attend, observe, and be heard in the meetings of elected and appointed public bodies, and to inspect and obtain copies of records made or received in connection with the official business of any public body, agency, officer, or employee; (2) stipulate that the Legislature could continue to enact statutes for the protection of personal privacy; (3) authorize the Legislature to enact statutes to limit the right of public access to government information to protect public safety or private property, to ensure the fair and effective administration of justice, or to provide for the preservation of public funds and resources; and (4) require that any denial of access to information must be based on particularized findings that a specified harm to the public interest cannot be averted by a reasonable alternative, unless the information is confidential communication between an attorney and his or her client.

ANALYSIS

Current Law

Section 3 of Article I of the California Constitution states:

> The people have the right to instruct their representatives, petition government for redress or grievances, and assemble freely to consult for the common good.

Various provisions of existing law provide for public access to government records and meetings of government bodies. Those provisions include, among others, the Bagley-Keene Open Meeting Act, the Ralph M. Brown Act, the California Public Records Act, the Legislative Open Records Act, and the Grunsky-Burton Open Meeting Act.

The **Bagley-Keene Open Meeting Act** (commencing with Government Code Section 11120) requires that meetings of state bodies be conducted openly, and that public writings pertaining to a matter subject to discussion or consideration at a public meeting be made available for public inspection. All disclosable public writings that are distributed to members of a state body are made available to the public upon request.

The Bagley-Keene Act requires that state bodies provide notice of its meetings to any person who requests such notice in writing. The notice shall include a specific agenda for the meeting, which shall include the items of business to be transacted or discussed. The public is provided the opportunity to directly address the state body on each agenda item before or during the state body's discussion or consideration of the item.

Closed sessions may not be held by any state body except as expressly authorized by the Bagley-Keene Open Meeting Act. Prior to holding any closed session, a state body is required to cite the authority for the closed session.

Assembly Bill 1752 (Ch. 156, 2002), effective January 1, 2003, amended Section 11125.1 of the Bagley-Keene Act to require the Board of Equalization to distribute public writings, except those involving a named tax or fee payer, that pertain to a topic under consideration at a public meeting to all persons who request copies, as well as post that information on the Internet, and make the writings available for public inspection at the meeting, prior to the Board taking final action on that item.

The **Ralph M. Brown Act** (commencing with Government Code Section 54950) requires that the meetings of local legislative bodies be conducted openly. The Brown Act requires that a local public body post a notice and an agenda for any regular meeting. Local public bodies are also required to provide a notice of its meetings to any person who requests such notice in writing. Closed meetings are the exception and permitted only if they meet defined purposes and follow special requirements.

The **California Public Records Act,** or PRA (commencing with Government Code Section 6250), provides for public access to any record maintained by a state and local agency, unless there is a statutory exemption that allows or requires the agency to withhold the record. Confidential information, as specified within each tax or fee program, is exempt from disclosure under the PRA and may not be released unless specifically authorized by the Governor or with the taxpayer's consent.

Under the PRA, public records are open to inspection at all times during the office hours of the state or local agencies and any person has a right to inspect any public record, unless exempt by statute. State and local agencies are required to establish written guidelines for accessibility of records. Any denial for request of public records, in whole or in part, must be in writing.

The **Legislative Open Records Act** (commencing with Government Code Section 9070) provides for public access to legislative records, unless exempt by statute. *Legislative records* is defined as any writing which contains information relating to the conduct of the public's business prepared, owned, used, or retained by the Legislature. *Legislature* is defined as any Member of the Legislature, any legislative officer, any standing, joint, or select committee or subcommittee of the Senate and Assembly, and any other agency or employee of the Legislature.

The **Grunsky-Burton Open Meeting Act** (commencing with Government Code Section 9027) requires that meetings of a house of the Legislature or a committee shall be open and public, and all persons shall be permitted to attend the meetings. Committee includes a standing committee, joint committee, conference committee, subcommittee, select committee, special committee, research committee, or any similar body.

This staff analysis is provided to address various administrative, cost, revenue and policy issues; it is not to be construed to reflect or suggest the Board's formal position.

A house of the Legislature or a committee may hold a closed session solely for the following purposes: (1) to consider the appointment, employment, evaluation of performance, or dismissal of a public officer or employee, and to consider complaints or charges brought against a Member of the Legislature or other public officer or employee; (2) to consider matters affecting safety and security; (3) to confer with legal counsel regarding pending litigation when discussion in open session would not protect the interests of the house or committee regarding the litigation; and (4) to hold Senate and Assembly caucuses.

Proposed Law

This bill would amend Section 3 of Article I of the California Constitution to provide that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. Public agencies and officers exist to aid in the conduct of the people's business, and their actions and deliberations shall be open to public scrutiny. Specifically, SCA 1 would:

- Provide that people have a right to attend, observe, and be heard in the meetings of elected and appointed public bodies, and to inspect and obtain copies of records made or received in connection with the official business of any public body, agency, officer, or employee, or anyone acting on their behalf. Information concerning the people's business includes information regarding the official performance or professional qualifications of elected officials or of appointed officials who have, or appear to have, substantial responsibility for the conduct of governmental affairs. This information also includes information regarding the professional qualifications of candidates or applicants for these elective or appointive positions.
- Provide that this constitutional amendment may not be construed to supersede the right to privacy contained in Article I, Section 1 of the California Constitution. Additionally, it would not limit the ability of the Legislature to provide laws, or the Judicial Council to provide rules consistent with statute, for the protection of personal privacy.
- Authorize the Legislature to provide by statute and the Judicial Council to provide by rule (consistent with statute) to limit the right of access to information concerning the conduct of the people's business solely to protect public safety or private property, to ensure the fair and effective administration of law, or to preserve public funds and resources.
- Require that denial of public access to information by a public body, agency, officer, or employee must be based on particularized findings that a specific harm to the public interest cannot be averted by reasonable alternatives, unless the information requested is a confidential communication between an attorney and his or her client. The denial of access could be no broader in scope or longer in duration than necessary to avert the specified harm.

- Limits availability of information relating to peace officers by requiring requests for information to conform to procedures governing discovery or disclosure enacted by the Legislature.
- Provide that this constitutional amendment would not apply to judicial proceedings or the records of judicial proceedings.
- Stipulate that all statutes and rules of court limiting access to information concerning the conduct of the people's business that are in effect on the operative date of this constitutional amendment shall remain in effect until amended, repealed, or judicially determined to be inconsistent with this constitutional amendment.

Background

This bill is identical to SCA 7 (Burton) of the 2001-2002 Legislative Session. SCA 7, sponsored by the California Newspaper Publishers Association (CNPA) and the California First Amendment Coalition (CFAC), died in the Assembly. The CNPA and the CFAC believe that SCA 7 would have strengthened and complemented the several existing statutes that protect the public's right to know, including the Ralph M. Brown and Bagley-Keene open meeting laws and the PRA. Both of these organizations, as well as other supporters, believe that the purpose of SCA 7 is to define just how open government should be. Supports believe that while there are open government laws, none of these laws have constitutional status, and all too often statutory and case law exceptions have allowed government business to occur in secret.

Opponents of SCA 7 believe that the measure would jeopardize existing legislatively determined exceptions to public access and lead to costly litigation. Opponents argue that the Legislature, rather than the courts, should make the final determination of what constitutes an exception to public access. Opponents also contend that the requirement to make "particularized findings" is unworkable and that the definition of an appointed official is vague. Finally, opponents expressed concern that certain existing exemptions of the PRA protecting the trade secrets or the gross receipts of a business may not survive a court challenge under the provisions of SCA 7.

COMMENTS:

1. **Sponsor and purpose.** This bill is also sponsored by the CNPA and the CFAC in an effort to make government more open. According to these organizations, "A fundamental tenant of democracy is that the government's business is the people's business; therefore, the public should not have to prove that a record or proceeding should be open, rather the burden should be upon government to demonstrate why a record or proceeding should remain secret."

   According to the author's staff, the purpose of this bill is to give Californians the right to: (1) define how open their government should be; (2) know what their government is doing; (3) express their views by being able to attend meetings of key government

bodies and be heard in those meetings; and, (4) find out information held in government records.

2. **The requirement that a public body's denial of access to information must be based on findings that a specified harm to the public could not be reasonably averted, creates uncertainty and invites litigation.** This bill would require that a state agency's restriction of access to information must be based on particularized findings that a specified harm to the public cannot be averted by a reasonable alternative. This bill also requires that the denial of a right may not be broader in scope or duration than necessary to avert the specified harm.

   State agencies are statutorily required to disclose records requested in writing by any person. However, state agencies may withhold information based on statutory exemptions.

   This provision of the bill makes every decision to limit access subject to interpretation and, therefore, invites litigation. It subjects existing statutory exemptions and protections contained in both the PRA and the Bagley-Keene Act to legal challenge and removes state agencies ability to rely on statutory language and policy direction contained within these acts.

3. **Existing statutes and rules limiting access to information could be found to be unconstitutional and in violation with the provisions of this bill.** This bill would provide that all statutes and rules of court limiting access to information shall remain in effect until they are amended, repealed or judicially determined to be inconsistent with the provisions of this bill. It is unclear the extent that existing statutes and rules could eventually be found to be invalid.

4. **The term "appointed officials" needs clarification.** This bill would allow access to information regarding the official performance or professional qualifications of elected and appointed officials. An argument can be made that all public employee positions are "appointed." It is recommended that language be added to clarify those position classifications covered under "appointed officials." Does "appointed" include career executive assignments (CEA)? The Board currently has 33 CEA positions, which include, among others, the Board's Chief Counsel, Assistant Chief Counsels, Deputy Directors, Chief of Field Operations, other division Chief positions, Headquarter Operations Manager, and Program Planning Manager.

5. **Existing open meeting laws require that the Board and other state agencies provide for public comment at public meetings.** This bill would provide that the people have a right to be heard in the meetings of public bodies. At Board meetings, the public is provided the opportunity to address the Board on any agenda item, as well as any matter within the scope of the Board's functions. The public is also provided the opportunity to participate in the formulation of rules, regulations, and audit guidelines adopted by the Board.

6. **Confidential taxpayer information currently exempt from disclosure may be subject to disclosure under the provisions of this bill.** This bill would provide that the people have a right to inspect and obtain copies of records in connection with the official business of a public body. Public meeting agendas, minutes of

public meetings of the Board including exhibits incorporated by reference, and documents distributed to Board Members for discussion or consideration at a public meeting are public records subject to disclosure unless exempted from disclosure by state or federal law. Documents exempted from disclosure include, but are not limited to, documents, such as hearing briefs or Appeals Division Decisions and Recommendation, that are comprised of confidential taxpayer information, and memoranda from Board legal staff or the Attorney General to Board Members, which are confidential communications between client and attorney. This constitutional amendment may jeopardize confidential taxpayer information, which is currently exempt from disclosure under the PRA and other privacy statutes.

COST ESTIMATE:

The Board already complies with the various open government statutes. Therefore, any costs associated with this bill would be absorbable.

REVENUE ESTIMATE:

This bill would not impact state revenues.